LEE YEE WUEN v. SEEK KENG MEE & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
CELESTINA STUEL GALID J
[ORIGINATING SUMMONS NO: SDK-24NCVC-6-3-2020]
10 JANUARY 2022

Abstract – *Sale and transfer of the shares which were held in trust for the deceased was wrongful and ought to be returned to the estate of the deceased for distribution in accordance to the last will of the deceased.*

COMPANY LAW: *Directors – Appointment – Written resolutions appointing first defendant as director not passed by majority members – Second defendant appointed by improperly constituted board of directors – Whether appointments of first and second defendants valid – Whether defendants absolved from complying with ss. 298(1) and 301(1) of Companies Act 2016 – Companies Act 2016, s. 306(4)*

COMPANY LAW: *Shares – Transfer – Validity of – Shares held by third defendant in trust for deceased transferred to first defendant – Shares bequeathed equally to plaintiff and first defendant but plaintiff received only part of shares – Whether transfer of shares by third defendant to first defendant wrongful – Whether trust deed illegal for being against public policy – Whether plaintiff as beneficiary has equity in estate of deceased and entitled to seek declaratory judgment – Whether right to commence action vested with executors since grant of probate issued – Sabah Land Ordinance, ss. 9(1) & 17*

The plaintiff and the second defendant were the children of the deceased who had incorporated the fourth defendant ('company') and several other companies, whilst the first defendant was the wife of the second defendant as well as a director of the company and holder of 900,000 shares ('shares') that were previously held in trust by the third defendant for the deceased. The plaintiff commenced proceedings against the defendants claiming, *inter alia,* that the transfer of the said shares to the first defendant was wrongful and that the appointment of the first and second defendants respectively, as director and managing director of the company, was wrongful and invalid. The plaintiff claimed that the deceased had bequeathed his shares in the company to her and the second defendant equally, but that she had only received 825,000 out of the 1,275,000 shares due to her; and that she had been denied her rights and/or legitimate expectation to participate in the management of the company by the second defendant. In addition to seeking the transfer of the remaining 450,000 shares to her, the plaintiff sought various declaratory and injunctive reliefs as well as orders pertaining to the resolutions and appointments of the first and second defendants. In relation to the said shares, the plaintiff as a beneficiary of the estate of the deceased

A also sought various reliefs that she was entitled to receive in equity following the principle in *Al-Rashidy Kassim & Ors v. Rosman Roslan* ('*Al-Rashidy*'). The defendants disputed the plaintiff's claims and contended, *inter alia,* that (i) the right to commence the action was vested in the executors and not the plaintiff since the grant of probate had already been issued as at the date of
B commencement of the action; and (ii) the plaintiff's action was bound to fail for having been based on a trust deed pursuant to which the said shares were previously held by the third defendant in trust for the deceased. It was argued that the trust deed was illegal for being against public policy as the third defendant was appointed as nominee for the deceased to circumvent the
C condition in the title deed of a piece of land owned by the company ('land') that not less than 30% of the shares in the company must be held by a native of Sabah. In this regard, reference was made to the letter dated 22 August 2016 from the Land and Surveys Department rejecting the company's application to delete the special terms and conditions on the ground that they were government policies ('letter'). Notwithstanding the contention that the
D trust deed was tainted with illegality, the defendants urged the court to give effect to the purported agreement for the sale of the said shares ('SPA') held by the third defendant to the second defendant and subsequently registered in the name of the first defendant. It was lastly submitted that native shares could not be transferred to a non-native.

E **Held (allowing plaintiff's claims with costs):**

(1) The principles in *Al-Rashidy* were not confined only to circumstances where the administrator or executor is yet to be appointed. The beneficiary had at least an equity in the estate of the deceased so as to
F be entitled to seek a declaratory judgment. It could not be said that the plaintiff lacked the *locus standi* to commence this action. (paras 28 & 36-40)

(2) Save for the reference to the letter from the Lands and Surveys Department, no other evidence was led to establish that there existed a
G public policy in relation to the special terms and conditions, the contravention of which would amount to an illegality. On the other hand, the decision of the director under s. 9(1) of the Ordinance was purely discretionary. The discretionary nature of the director's power under the said provision is to be distinguished from the prohibition
H under s. 17 of the Ordinance. Even if there were merits to the defendants' allegation of non-compliance of the special terms, such non-compliance if at all, would only affect the company's right to the land, ownership of which may be liable to be cancelled if the director deemed it to be so. To deprive the estate and the beneficiary(s) of the deceased
I of the said shares under the circumstances, would be an overkill. (paras 62, 67-70 & 73)

(3) The sale of the shares by the third defendant and the subsequent transfer to the first defendant was somewhat irreconcilable with the defendants' submission that the trust deed was illegal and contrary to the maxim *nemo dat quod non habet*. If indeed the trust deed was illegal, then there was nothing for the third defendant to have passed on to the second defendant and or the first defendant. Further, the term 'native shares' do not form part of the companies' legislation of Malaysia. For all intents and purposes, the said shares were like any other shares in the company which may be transferred to a non-native. (paras 82 & 84)

(4) The allegation that the deceased had given the said shares to the third defendant was a recent creation by the defendants to bolster their case that the shares were lawfully transferred by the third defendant to the first defendant. The terms of the SPA clearly showed that it was a sham transaction that was designed to effect the transfer to the first defendant, shares that formed part of the estate of the deceased as indicated in cl. 20 of the deceased's will. On the totality of the evidence and given that the shares were trust properties, the sale thereof by the third defendant to the second defendant and the transfer to the first defendant was wrongful and the shares were liable to be returned to the estate of the deceased. (paras 88, 90-95 & 97-102)

(5) The second and third defendants' combined shareholding of 45% was insufficient to give them a majority within the meaning of s. 291(1) of the Companies Act 2016 ('Act'). Hence, their signing of the members' written resolution pertaining to the appointment of the first defendant as managing director was contrary to the written representation that it was by all of the members of the company as well as contrary to s. 306(4) of the Act which requires such resolution to be passed by the majority members signifying their agreement to the resolution. The appointment of the first defendant clearly was engineered by the second defendant to change the mandates of the company's bank accounts and to give the first defendant control over the company's finances to the exclusion of the plaintiff. (paras 106-108)

(6) The fact that the executors did not want to interfere with the management of the company did not absolve the defendants from complying with ss. 298(1) and 301(1) of the Act which required service of the proposed members' written resolution on the executors who stood in the shoes of the deceased pursuant to cl. 24 of the MAA. For that reason, the appointment of the first defendant as director was invalid. Therefore, the Board of Directors was improperly constituted when it purported to appoint the second defendant as managing director. To accept the argument that the appointments are purely internal management matters, would be to ignore the findings that the sale of the shares was to deprive the plaintiff of her beneficial rights under the last

A will of the deceased and to discard the evidence that resolutions were passed to exclude her from being a compulsory signatory of the company's accounts, the effect of which was to deprive her of any knowledge of the company's financial transactions and any say in the management of the company. (paras 109-111)

B **Case(s) referred to:**

Abdul Rahman Mohd Noor v. The Director Of Lands And Surveys & Ors [2013] 5 BLR 95 ***(refd)***

Al-Rashidy Kassim & Ors v. Rosman Roslan [2007] 3 CLJ 361 FC ***(refd)***

Bellajade Sdn Bhd v. CME Group Bhd & Anor [2015] 7 CLJ 343 HC ***(dist)***

Bellajade Sdn Bhd v. CME Group Bhd & Anor [2017] 1 CLJ 43 CA ***(dist)***

C *Dato' Hamzah Abdul Majid v. Omega Securities Sdn Bhd [2015] 9 CLJ 677 FC* ***(refd)***

Edgar Stephen Pereira v. Mohd Nasir Abdullah [2008] 1 LNS 537 HC ***(dist)***

Euggine Kausai v. Yapidmas Plantation Sdn Bhd & Ors [2020] 1 LNS 1073 HC ***(dist)***

Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC ***(refd)***

Instantcolor System Sdn Bhd v. Inkmaker Asia Pacific Sdn Bhd [2017] 4 CLJ 1 FC ***(refd)***

D *John Adewale Haastrup v. Gloria Ngozi Okorie & Ors [2016] EWHC 12* ***(refd)***

Kelana Megah Development Sdn Bhd v. Kerajaan Negeri Johor & Another Appeal [2016] 8 CLJ 804 CA ***(refd)***

Lai Wooi Giap v. Rosli Zakaria & Anor [2020] 7 CLJ 477 CA ***(refd)***

Lee Mooy Keaw & Ors v. Chan Ah Kim & Ors [2019] 1 LNS 1801 HC ***(refd)***

Lee Pooi Chun v. Lee Kah Gee [1971] 1 LNS 59 FC ***(dist)***

E *Lim Fong Tsin & Ors v. The Assistant Collector Of Land & Ors [1997] 1 LNS 7 HC* ***(refd)***

Lim Guan Eng v. Ruslan Kassim & Another Appeal [2021] 4 CLJ 155 FC ***(dist)***

Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2019] 1 CLJ 183 FC ***(refd)***

Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors [2017] 9 CLJ 401 FC ***(dist)***

F *Mega Meisa Sdn Bhd & Ors v. Mustapah Dorani & Another Appeal [2020] 1 LNS 1480 CA* ***(refd)***

Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(dist)***

Mohamed Zahid Yon Mohamed Fuad v. Jason Jonathan Lo & Ors [2019] 1 LNS 343 HC ***(dist)***

G *Palaniappa Chettiar v. Arunasalam Chettiar [1962] 1 LNS 115* ***(dist)***

Pang Mun Chung & Anor v. Cheong Huey Charn [2018] 8 CLJ 663 CA ***(refd)***

Patel v. Mirza [2017] 1 All ER 191 ***(refd)***

Pua Kim Seng v. Mohamad Khashim Abdul Sakor & Anor [2010] 1 LNS 29 CA ***(refd)***

Sa-Mal (Sabah) Corporation Sdn Bhd v. Director Of Lands And Surveys, Sabah [1994] 3 CLJ 229 HC ***(refd)***

H *Seah Teong Kang and another v. Seah Yong Chwan [2015] 5 SLR 792* ***(refd)***

Sia Hiong Tee & Ors v. Chong Su Kong & Ors [2015] 8 CLJ 1173 FC ***(refd)***

Tan Sri Dato' Lim Cheng Pow v. Bellajade Sdn Bhd & Another Appeal [2021] 10 CLJ 183 FC ***(refd)***

Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor [2017] 6 CLJ 368 CA ***(refd)***

I *Ulimas Sdn Bhd v. Hi-Summit Construction Sdn Bhd & Other Appeals [2017] 2 CLJ 636 FC* ***(refd)***

United Renewable Energy Co Ltd v. TS Solartech Sdn Bhd [2019] 8 CLJ 721 HC ***(refd)***
Utusan Melayu (Malaysia) Bhd v. Dato' Sri DiRaja Hj Adnan Hj Yaakob [2016] 5 CLJ 857 CA ***(dist)***
Wan Mohamad Hj Undas & Anor v. The Director Of Lands And Surveys & Ors [2013] 5 BLR 87 ***(refd)***
Wong Kien Ching & Ors v. Ria Realiti Sdn Bhd & Ors And Another Case [2020] 1 LNS 2243 HC ***(dist)***
Wong Kien Ching v. Seng Kim Huat & Anor [2019] 7 CLJ 356 CA ***(dist)***
Workon Sdn Bhd v. The Director Of Lands & Surveys, Sabah & Ors [1999] 1 LNS 40 HC ***(refd)***
Yeo Ing King v. Melawangi Sdn Bhd [2017] 1 CLJ 512 CA ***(refd)***

Legislation referred to:
Companies Act 2016, ss. 291(1), 298(1), 301(1), 306(4)
Companies Act 1965, s. 368A(1), (4)
Contracts Act 1950, s. 24(c), (e)
Land Ordinance (Sabah) (Cap 68), ss. 9(1), 17, 64
Probate and Administration Ordinance (Sabah) (Cap 109), ss. 3, 93(1)
Rules of Court 2012, O. 18 r. 8

For the plaintiff - Norbert Yapp & Sarah Tiong; M/s Norbert Yapp & Assocs
For the 1st, 2nd & 4th defendants - Edwin Tsen & Caroline Hee; M/s Tan Pang Tsen & Co

Reported by Gavin Xavier

JUDGMENT

Celestina Stuel Galid J:

Introduction

[1] The present action involved a family dispute which unfortunately rang a too-familiar tune after the passing of either the patriarch or matriarch of the family. In this case, it was the passing of the father, Lee Poh Sin ("the deceased") on 10 September 2018 and the dispute was between the only two children of the family, the plaintiff and the second defendant.

[2] The fourth defendant ("the company") was incorporated by the deceased who was the then Managing Director of the company. The deceased had also set up other companies in his lifetime, namely Ladang Sri Harapan (Sabah) Sdn Bhd ("LSH"), Maju Jaya Quarry Sdn Bhd ("MJQ") and Kian Yiap Trading Sdn Bhd ("Kian Yiap").

[3] The first defendant was the wife of the second defendant and was appointed as a director of the company on 1 October 2018. The first defendant became the registered shareholder of 900,000 shares ("the said shares") in the company which were previously held by the third defendant in trust for the deceased pursuant to a trust deed dated 27 April 2004 ("the trust deed"). The said shares were the subject matter of this dispute.

[4] The second defendant was a director who held 450,000 shares in the company. The second defendant was appointed as the Managing Director of the company with effect from 13 December 2018.

[5] The third defendant had previously and until 5 October 2018 when they were transferred to the first defendant, held the said shares under certificate no(s). 4, 7 and 10. Initially, the solicitors acting for the first, second and fourth defendants also represented the third defendant but subsequently applied to withdraw themselves, leaving the third defendant unrepresented in this action. Other than testifying as a subpoenaed witness by the plaintiff as PW2, the third defendant did not take part in the trial.

[6] Unless specified otherwise, the first, second and fourth defendants shall herein be collectively referred to as "the defendants".

The Plaintiff's Complaints

[7] The present action was initially commenced *vide* an originating summons but which was later converted into a writ action upon the defendants' application under encl. 53. In granting the said application, this court had expressly directed that the originating summons (encl. 1) and affidavit in support (encl. 2), the affidavit in opposition (encls. 12, 13 and 14) and the affidavit in reply (encl. 16) stand as the pleadings.

[8] From her averments in the affidavits filed for the originating summons, the plaintiff's complaints may be summarised in the following headings:

(i) alleged wrongful transfer of the said shares from the third defendant to the first defendant;

(ii) alleged wrongful appointment of the first defendant as director of the company; and

(iii) alleged invalid appointment of the second defendant as Managing Director of the company.

[9] The plaintiff claimed that the third defendant had informed her that she was asked to sign the transfer form for the said shares by the first and second defendants. The third defendant had lodged a police report on the matter on 31 July 2019. In that police report, the third defendant stated that she was asked to sign the transfer forms in October 2018.

[10] On 1 October 2018, the second and third defendants purporting to be "all the members" of the company resolved to appoint the first defendant as a director. According to the plaintiff, this resolution was ineffective, null and void as it was not passed in accordance with the requirements of the Companies Act 2016 ("the Act").

[11] Furthermore, contrary to what was stated in the resolution, the second and third defendants were not all the members of the company then as 1,650,000 or 55% of the shares belonging to the deceased were, at the material time, under the control of the executors of the estate of the deceased, Rockwills Trustee Berhad ("the executors") which had yet to obtain the grant of probate over the estate.

[12] According to the plaintiff further, the deceased had, under his last will and testament dated 2 January 2018 ("the last will"), bequeathed his shares in the company equally to both the plaintiff and the second defendant, *ie*, 1,275,000 shares each, the same of which included the said shares held on trust by the third defendant. A grant of probate was issued over the estate of the deceased on 14 December 2018, however, the plaintiff had only received 825,000 shares in the company out of the total of 1,275,000 due to her.

[13] The plaintiff further claimed that the second defendant's appointment as the Managing Director of the company with effect from 13 December 2018 was also ineffective, null and void and invalid as there was no proper or valid resolution approving the said appointment.

[14] The plaintiff further complained that although she was made an authorised signatory of the company's account with Public Bank Berhad since the account was opened on 24 August 2018, after the deceased passed away, the second defendant made himself the compulsory signatory and caused the first defendant to be made a signatory of the account thereby enabling him to withdraw monies from it without having to get the plaintiff's signatures for the said withdrawals.

[15] The plaintiff also complained that the second defendant was denying her of the rights and/or legitimate expectation to participate in the management of the company and that he was using his position as the company's Managing Director to do so. This included accusing her of trespassing in the company's estate and office premises and demanding that the plaintiff obtained the second defendant's permission before going to any of the company's premises.

The Defendant's Answers

[16] With regards to the transfer of the said shares, the second defendant stated that it was their mother's wish for the said shares to be returned to their family. He averred that upon discussion, the third defendant willingly agreed to sell the said shares and a sale and purchase agreement was executed between the second and third defendants on 5 October 2018 ("the SPA").

[17] The second defendant further explained that the said shares were transferred to the first defendant who was a native to comply with the condition in the land held under CL085311146 ("the land") owned by the company that it must have a 30% shareholding held by a native. Hence, the appointment of the first defendant as director of the fourth defendant was in accordance with the said condition.

[18] As for the third defendant's police report, the second defendant claimed that the third defendant informed him that she was forced by the plaintiff to lodge it. The third defendant had also made another police report retracting her earlier report.

[19] The second defendant stated that his appointment as Managing Director of the company was valid and effective.

[20] The first defendant confirmed the matters stated by the second defendant pertaining to the transfer of the said shares and her appointment as director of the fourth defendant. She further stated that she was just following her husband's wishes and that all were arranged by him.

Preliminary Issues

Whether The Plaintiff Was The Proper Plaintiff?

[21] It was not in dispute that the grant of probate was already issued at the time of commencement of the action. It was contended for the defendants that as such, the right to commence the action was vested in the executors and not the plaintiff, citing the case of *Lee Mooy Keaw & Ors v. Chan Ah Kim & Ors* [2019] 1 LNS 1801 and *John Adewale Haastrup v. Gloria Ngozi Okorie & Ors* [2016] EWHC 12 (Ch). This was because the said shares forming the subject matter of the action were alleged by the plaintiff to form part of the estate of the deceased.

[22] In support, learned counsel for the defendants cited ss. 3 and 93 of the Sabah Probate and Administration Ordinance, reproduced below:

> 3. The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such:
>
> Provided that nothing herein contained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person.
>
> ...
>
> 93(1) An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debts due to him at the time of his death, as the deceased had when living.

[23] On the part of the plaintiff, the Federal Court case of *Al-Rashidy Kassim & Ors v. Rosman Roslan* [2007] 3 CLJ 361 was cited wherein the following question of law was considered: A

> Whether the beneficiaries of the deceased person without first obtaining the Letters of Administration have a *locus standi* to commence an action to protect and to regain the land which has been fraudulently obtained by an outsider. B

[24] The Federal Court answered the question in the affirmative, *inter alia*, holding that notwithstanding that there were no letters of administration taken out yet, the beneficiaries were entitled to commence legal action in order to protect and preserve the assets of the estate of the deceased. C

[25] It was submitted for the plaintiff that there were special circumstances in the present case which necessitated the plaintiff to commence the action. Firstly, the executors were dragging their feet to recover the said shares despite having discovered the existence of the trust deed since March 2019. Secondly, there was urgency for the plaintiff to act as the first and second defendants had taken over full control of the company in reliance of the impugned transfer and resolutions. D

[26] Not surprisingly, the defendants contended otherwise, that the plaintiff could not rely on *Al-Rashidy*'s case. It was submitted that the facts of the present case were distinguishable in that unlike in the former, the executors had already been appointed. To bring home the point, it was highlighted by the defendants in their written submissions that PW4 who testified for the executors was alleged to have stated that "it was the plaintiff who had wanted to commence this action to recover her purported 450,000 shares held by Rosnani and that it was not due to the executor not willing or wanting to take any legal action to recover the 900,000 shares in the name of Rosnani to protect the interest of the beneficiary in the trust estate". E F

[27] Respectfully, as can be seen in the following extract of the relevant notes of proceeding ("NOP") that was not what PW4 actually said in her evidence: G

> Q988 Rockwills did not proceed with any action because in the Will it stated very clearly the words "my holding of shares ..." of the testator. The words meant that only the shares of the testator as appearing in Form 24 and also in the records filed with the Companies Commission at pages 33 to 34 and at page 44 of Encl 110, correct? H
>
> A It's not because of the documents. as mentioned earlier, Ms Lee Yee Wuen had taken action hence to avoid duplicity, Rockwills did not proceed.

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A Q989 You did not at any time tell Lee Yee Wuen that Rockwills will not commence legal action in respect of the 900,000 shares in the name of Rosnani. Correct?

A I cannot recall.

B **[28]** For my part, I did not subscribe to the view that the principle in *Al-Rashidy*'s case was confined only to circumstances where the administrator or executor is yet to be appointed as contended by the defendants. This was made amply clear by the Federal Court when it held as follows:

C [18] We agree with the view expressed by the Singapore Court of Appeal in that the special circumstances should not be confined solely to cases where the personal representative had defaulted in recovering the property of the estate. *We are of the view that all the circumstances of the case ought to be considered by the court in arriving at a just result. Secondly, following Re Atkinson and Omar Ali bin Mohd., we think the beneficiary has at least an* D *equity in the estate of the deceased to entitle the beneficiary to seek on behalf of the estate the remedy of a declaratory judgment.*

[19] In the present case the action was commenced by the beneficiaries of the estate in order to regain the said land from the respondent whom they alleged had by fraudulent means transferred the land to himself. The E respondent had also entered upon the land and damaged the fruit trees and demolished buildings found on the said land. Further, the said land is liable to be sold by the respondent to a third party. In that event the said land may be lost forever. This becomes more urgent in view of the decision of this court in *Adorna Properties Sdn. Bhd. v. Boonsom Boonyamit* [2001] 2 CLJ 133, which confers immediate indefeasible title to a F purchaser in good faith for valuable consideration.

[20] Thus, the appellants have had to act fast in order to protect and preserve the estate of the deceased. Therefore, on the facts of this case, we find, there exist special circumstances for the beneficiaries to commence legal action against the respondent *qua* beneficiaries for the purpose of protecting and preserving the asset of the estate. *Quite apart* G *from that we also hold that the beneficiaries in the present case have at least an equity in the estate of the deceased to entitle them to seek a declaratory judgment.* Thus, on the above grounds are agree with the learned counsel for the appellants that the appellants in this case had the *locus standi* to commence this action at least for the limited purpose of protecting and preserving the asset of the estate. (emphasis added)

H **[29]** To appreciate the matter further, it will be relevant to reproduce the prayers sought for by the plaintiff in this action:

(1) A declaration that the appointment of the 1st Defendant as a director of the Company pursuant to the Resolution dated 01.10.2018 is I ineffective, null and void and invalid;

(2) An order directing the Company and/or the Company Secretary to cancel and/or reverse the said Resolution and that all and any documents and records recording the same in whatsoever manner be rectified accordingly;

(3) An order that all directors' resolutions of the Company where the 1st Defendant purportedly exercised her purported right as a director in the Company be cancelled and/or reversed and that the books and records of the Company and all and any documents and records recording the same in whatsoever manner be rectified accordingly;

(4) An injunction restraining the 1st Defendant from acting, proclaiming or holding herself out as a director of the Company;

(5) A declaration that the appointment of the 2nd Defendant as the Managing Director of the Company with effect from 13.12.2018 is ineffective, null and void and invalid;

(6) An order directing the Company and/or the Company Secretary to cancel and/or reverse the purported appointment of the 2nd Defendant as the Managing Director of the Company and that all and any documents and records recording the same in whatsoever manner be rectified accordingly;

(7) An order that all directors' resolutions of the Company where the 2nd Defendant purportedly exercised his purported right or power as the Managing Director in the Company be cancelled and/or reversed and that the books and records of the Company and all and any documents and records recording the same in whatsoever manner be rectified accordingly;

(8) An injunction restraining the 2nd Defendant from acting, proclaiming or holding himself out as the Managing Director of the Company;

(9) A declaration that the 3rd Defendant is at all material times holding the said Shares in the Company under certificate no. 4, 7 and 10 in trust for the Deceased;

(10) A declaration that the purported Directors' Resolution in writing dated 5.10.2018 signed by the 1st Defendant and the 2nd Defendant approving the transfer of the said Shares to the 1st Defendant is ineffective, null and void and invalid;

(11) An order directing the Company and/or the Company Secretary to cancel and/or reverse the Resolution dated 5.10.2018 and that the register of members of the Company be rectified pursuant to Section 103 of the Act by striking out the name of the 1st Defendant as holder of the said Shares and by inserting *in lieu* thereof the name of the 3rd Defendant the registered holder of the said Shares and notice of such rectification be given to Registrar of Companies;

(12) An order that all members' resolutions of the Company where the 1st Defendant purportedly exercised the voting rights attached to the 900,000 ordinary shares of RM1.00 each in the Company be cancelled and/or

A reversed and that the books and records of the Company and all and any documents and records recording the same in whatsoever manner be rectified accordingly;

(13) A declaration that the Plaintiff is beneficially entitled to 450,000 units of the said Shares pursuant to the Last Will of the Deceased dated
B 02.01.2018;

(14) As order directing the 3rd Defendant to transfer or cause to be transferred unto the name of the Plaintiff 450,000 units of the said Shares in accordance with the Last Will and in default thereof the Deputy Registrar of the High Court shall execute the instrument of transfer on behalf of the 3rd Defendant;
C

(15) Such further or ancillary and consequential orders and/or directions be made or given that the Court deems just and expedient; and

(16) That the costs of and occasioned by the application be paid by the 1st and 2nd Defendants to the Plaintiff on a full indemnity basis.

D **[30]** As can be seen from the above, prayers (1) to (8) were in respect of the resolutions and appointments of the first defendant and second defendant respectively as director and Managing Director of the company which were independent of the plaintiff's claim for the transfer of 450,000 of the said shares to her.

E **[31]** Prayers (9) to (13) were in relation to the said shares but from my reading of them, they were certainly remedies which the plaintiff as a beneficiary to the estate of the deceased was entitled in equity to seek for the benefit of the estate following the principle in *Al-Rashidy*'s case.

F **[32]** If at all, only prayer (14) was a claim by the plaintiff to assert her beneficial interest (in part) of the said shares. Suffice to say that when taken in totality, the plaintiff's claim could not be said to fall outside of the exception laid down in *Al-Rashidy*'s case.

[33] In addition, there was another reason why the defendants' challenge
G on the plaintiff's *locus standi* could not be sustained. In *Lai Wooi Giap v. Rosli Zakaria & Anor* [2020] 7 CLJ 477; [2020] MLJU 558, the appellants contended before the Court of Appeal that the respondents who were the beneficiaries of a deceased co-owner of land did not have *locus standi* to commence the action without first obtaining letters of administration and
H neither did they come within the exception in *Al-Rashidy*'s case. However, the Court of Appeal found that the issue was never pleaded and never canvassed before the High Court and thus, deprived the respondents from leading evidence to show special circumstances.

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[34] The same could be said in the present case as the defendants had not at any time before the trial, questioned the *locus standi* of the plaintiff. This was despite multiple interlocutory applications preceded the trial of the action. In fact, the plaintiff who testified as PW1 was never challenged in cross-examination on her right to commence the action.

[35] As the following exchanges show (pp. 190 to 192, NOP), it was learned counsel for the defendants who "cursorily" informed the court that this was part of the issues to be determined:

Court: Mr Tsen, do you agree that those are the issues which I have set out? I know you all did not put in a statement of agreed issues but based on the affidavits and averments, those should be the issues, isn't it?

DC: That will be one of the issues.

Court: I have already named three. Shares, appointment of the director and appointment of the managing director. What other issues are there?

DC: The issue of the *locus standi* of the Plaintiff who is entitled to bring the action. The court has said that the property of the deceased is vested in the executor.

Court: That's the first time I'm hearing the issue of *locus standi.* Mr Yapp?

PC: It has not been raised. It's not even part of the case.

DC: But that's the law.

PC: That's not even in the proposed issues.

Court: This is the first time I'm hearing this.

DC: That's why there are no agreed issues but that's a question of law who has the right to commence the action.

[36] The defendants relied on the Federal Court case of *Lim Guan Eng v. Ruslan Kassim & Another Appeal* [2021] 4 CLJ 155 to contend that the *locus standi* issue could be raised at any time even though it was not pleaded as it went to the issue of jurisdiction.

[37] In that case, the issue of the plaintiff's *locus standi* was not pleaded nor raised in the High Court. The issue was also not included in the memorandum of appeal nor in written submissions of the parties. However, the Court of Appeal raised the issue on its own motion in the light of its earlier decision in *Utusan Melayu (Malaysia) Bhd v. Dato' Sri DiRaja Hj Adnan Hj Yaakob* [2016] 5 CLJ 857 where it was held that the plaintiff had no *locus standi* to sue for defamation in his official capacity as the Menteri Besar of Pahang.

[38] On appeal to the Federal Court, it was held as follows:

> [40] In coming to this view, I have not overlooked the criticism by plaintiff's counsel that the issue of *locus standi* of the plaintiff to bring this action was never pleaded or argued in the High Court. Being a jurisdictional challenge, I think the Court of Appeal was quite right in raising this issue especially since the *Adnan Yaakob* decision, which was starkly on point, was staring at them. The important consideration is that the parties were given a chance to submit on this new issue and so that they cannot claim prejudice. It was also a matter, I think, that could be decided by looking at the pleadings alone and did not require *viva voce* evidence.

[39] The facts in that case were clearly distinguishable as there, the *locus standi* issue was raised by the Court of Appeal on its own motion, having regard to its earlier decision in *Adnan Yaakob*. More importantly, in the present case before me, it could not be said to be a matter of merely looking at the pleadings as they were silent on this issue.

[40] For these reasons, I was not persuaded by the contention that the plaintiff was not clothed with *locus standi* to commence this action.

Whether "Illegality' Barred The Plaintiff's Claim?

[41] It was submitted for the defendants that the plaintiff's claim was bound to fail as it was premised on the illegal trust deed, that she was relying on the illegal instrument for the said shares to be transferred to her.

[42] The trust deed was illegal according to the defendants as the appointment of the third defendant as the nominee of the deceased was to circumvent the condition in the title deed to the land that the shares in the company must be held by a native of Sabah of not less than 30%. In addition to the trust deed, the third defendant had also executed a power of attorney dated 27 April 2004 giving power to the deceased to deal with the said shares absolutely.

[43] For the plaintiff, reference was first made to O. 18 r. 8 of the Rules of Court 2012 to contend that illegality must be specifically pleaded. In addition, the plaintiff cited the following cases to drive home the point that the court ought not to entertain matters which were not pleaded: *Mega Meisa Sdn Bhd & Ors v. Mustapah Dorani & Another Appeal* [2020] 1 LNS 1480, *Dato' Hamzah Abdul Majid v. Omega Securities Sdn Bhd* [2015] 9 CLJ 677, *Instantcolor System Sdn Bhd v. Inkmaker Asia Pacific Sdn Bhd* [2017] 4 CLJ 1 and *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415.

[44] That the illegality point was not a pleaded issue by the defendants which was only raised in the midst of the trial was not disputable – see pp. 349 to 353, NOP.

[45] To counter this hurdle, learned counsel for the defendants cited the case *Euggine Kausai v. Yapidmas Plantation Sdn Bhd & Ors* [2020] 1 LNS 1073 to contend that the court was entitled to take judicial notice of the illegality although not expressly pleaded.

[46] In addition, the cases *Edgar Stephen Pereira v. Mohd Nasir Abdullah* [2008] 1 LNS 537, *Lee Pooi Chun v. Lee Kah Gee* [1971] 1 LNS 59, *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] 1 LNS 115, *Bellajade Sdn Bhd v. CME Group Bhd & Anor* [2015] 7 CLJ 343, *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212 and the decision of this court in *Wong Kien Ching & Ors v. Ria Realiti Sdn Bhd & Ors And Another Case* [2020] 1 LNS 2243 were cited to show the attitude of the courts in matters concerning deception on the authorities. It was submitted that the courts have consistently refused to lend a hand where it involved illegal dealings.

[47] Having considered the cases cited by the defendants, I was in agreement with the plaintiff that they were easily distinguishable on their own facts.

[48] Firstly, the unpleaded illegality issue in *Euggine Kausai* was in respect of the prohibition under ss. 17 and 64 of the Sabah Land Ordinance ("the Ordinance") which was not the case in the present.

[49] Contrary to the submissions by the defendants, the case of *Edgar Stephen Pereira* was of no assistance to their case at all as the court was in fact not persuaded that the trust deed, in that case, was against public policy.

[50] In *Lee Pooi Chun* the sham agreement was found to be a device to evade rent control law whereas in *Palaniappa Chettiar* there was a positive finding by the court that the transfer of the land in question by the father to the son was made for a fraudulent purpose.

[51] As for the case of *Bellajade Sdn Bhd*, the High Court's finding that the tenancy agreement was tainted with illegality was overruled by the Court of Appeal in *Bellajade Sdn Bhd v. CME Group Bhd & Anor* [2017] 1 CLJ 43. The matter went to the Federal Court – see *Tan Sri Dato' Lim Cheng Pow v. Bellajade Sdn Bhd & Another Appeal* [2021] 10 CLJ 183 where one of the leave questions was on the illegality issue. On the facts, the Federal Court found that the agreement was not void *ab initio* as "there was no obvious intention to commit or even perpetuate the illegality" and that the dealing between the parties were "above board at the start".

[52] In *Merong Mahawangsa*, the issue before the Federal Court was "whether an agreement to provide services to influence the decision of a public decision-maker to award a contract is a contract opposed to public policy as defined under s. 24(e) of the Contracts Act 1950 and is therefore void".

[53] The Federal Court answered the question in the affirmative, stating that such agreement was "destructive of sound and good administration", that it "showed a tendency to corrupt or influence public servants to give favourable decisions otherwise than on their own merits" and that it was "contrary to public policy". It was therefore not difficult to see why the Federal Court came to such a conclusion as to answer the question in the negative would have been to open the door for outright corruption to exist. This case was therefore not of any assistance to the defendants in as far as the "public policy" issue was concerned.

[54] As may be seen from the above, none of the cases cited by the defendants in support of the "illegality issue" was decided on s. 9(1) of the Ordinance which was the relevant provision to the issue before me. It deals with the discretion of the Director of the Lands and Surveys Department ("the director") in the alienation of State land including to imposing special conditions on the titles thereto:

> 9(1) Subject to any general or special direction of the Cabinet the Director may alienate State land on such terms or in such manner as is authorised by this Ordinance and **may also impose special conditions** in respect thereof to be set out in the title. (emphasis added)

[55] The special terms and conditions on the title of the land in the present case read as follows:

> Not less than 30% of the undivided share of the said land or not less than 30% of the equity of the registered owner (where the registered owner is a company incorporated or registered under the Companies Act, 1965 or any re-enactment thereof) shall be transferred to or held by or registered in the name of Native(s) not later than 5 (five) years from the date of completion of development as stipulated in the development covenant herein or any amendment thereto and such percentage of undivided share or equity shall at all times thereafter remain so held by or registered in the name of NATIVE(S). For the purpose of the above, "NATIVE(S)" shall include any State Government Agency duly approved by the Secretary of Natural Resources as such.
>
> Except as provided above, transfer and sublease of this title is prohibited until such time as the said land has been fully developed in accordance with the terms and conditions herein.

[56] The special terms and conditions were absent when the land title was first alienated to its original owner, Lumangis Cocoa Plantation Sdn Bhd on 4 September 1980. They were only added on 4 August 1995. The company became the registered owner of the land on 8 October 2004.

[57] The defendants had referred to a letter from the Lands and Surveys Department dated 22 August 2016 which rejected the company's application to delete the special terms and conditions on the ground that they were

Government policies. This was the basis for the defendants to contend that the trust deed was illegal for being against public policy under s. 24(e) of the Contracts Act 1950. The defendants also referred to s. 24(c) of the Contracts Act 1950 and contended that the deceased had committed fraud on the State Government in misleading the Lands and Surveys Department to believe that the company had a 30% native shareholding when it did not.

[58] Firstly, it must be borne in mind that the court needs to identify with precision the nature of the public policy which may call into question the transactions to which the parties were involved – see *Pang Mun Chung & Anor v. Cheong Huey Charn* [2018] 8 CLJ 663; [2018] 4 MLJ 594.

[59] The case of *Pua Kim Seng v. Mohamad Khashim Abdul Sakor & Anor* [2010] 1 LNS 29 is instructive on this issue. The High Court had earlier dismissed the appellant's application for a declaration that the first respondent was holding 20 shares in the second respondent company on trust for the appellant pursuant to a trust deed. The High Court held that the trust deed was unenforceable as it contravened art. 6 of the second respondent company's articles of association.

[60] Before the Court of Appeal, it was contended for the first respondent that the trust deed was designed by the appellant to deceive Perbadanan Kemajuan Negeri Selangor ("PKNS") because in the lease agreement of the land between the second respondent company and PKNS there was a condition precedent that the second respondent company must have a Bumiputra shareholding of 51%. The effect of transferring the 20 shares to the appellant would give the appellant a 69% shareholding in the second respondent company. It was therefore submitted that the trust deed was illegal and void under s. 24 of the Contracts Act 1950.

[61] The Court of Appeal was not persuaded with the argument, holding as follows:

> [21] On the second issue, s. 24(e) of the Contracts Act 1950 provides that the consideration or object of an agreement is lawful, unless the court regards it as immoral, or opposed to public policy.
>
> [22] We agree with the submission by learned counsel of the appellant that the first respondent did not adduce any evidence to show that in the lease agreement between the second respondent company and PKNS there was a condition precedent to say that the second respondent company must have a Bumiputra shareholding of 51 percent. As the averment was made by the first respondent the burden was on the first respondent to prove that there was such a condition.
>
> [23] Furthermore, even if there was such a condition, it had not been shown by the first respondent that such policy was in fact a public policy. No affidavit or document from the relevant government department was exhibited to support such averment. In this connection it is relevant to

A refer to the case of *Theresa Chong v. Kin Khoon & Co* [1976] 1 LNS 165; [1976] 2 MLJ 253. In that case the plaintiff are stock and share brokers and they are members of the stock exchange of Malaysia and Singapore, which is governed by its by-laws. The by-laws provide for a member firm to appoint a remisier whose name is required to be registered with the stock exchange. The defendant acted as remisier for the plaintiffs B although she was not registered with the stock exchange as such.

...

[26] Having carefully considered the submissions and the affidavit evidence we held that there was no merit in the first respondent's contention that the trust deed was void as being contrary to the public C policy pursuant to s. 24(e) of the Contracts Act 1950. There was no evidence to show that there was such a policy practised by the State Government of Selangor with regard to the Land and secondly, there was no evidence to show that that policy was in fact a public policy. More importantly, it had not been shown that the trust deed was "incontestably and on any view inimical to the public interest". On the facts of the D present case the trust deed, in our view, did not fall under any of the specific classes of contracts which have been ruled by authority to be contrary to the policy of the law.

[62] In the present case, save for referring to the letter from the Lands and Surveys Department dated 22 August 2016, no other evidence was led by the E defendants to establish that there indeed existed a public policy in relation to the special terms and conditions for which a contravention would amount to an illegality.

[63] Bearing in mind that the said letter was included in the Part B bundle of documents (*ie*, which contents were subject to proof – see *Yeo Ing King* F *v. Melawangi Sdn Bhd* [2017] 1 CLJ 512; [2016] 5 MLJ 631), the defendants bore the burden of leading evidence on the truth of its contents namely that the special terms and conditions on the title to the land were part of the "Government policies".

G **[64]** The defendants' evidence on this letter was only through the second defendant who testified as DW1 in his witness statement as follows (see Q/A 30 and 31, DW1-WS):

Q: After the land. Was registered to POR, did. Your late father make any application to the authorities to remove this 30% native H condition?

A: Yes, we did write to the Lands and Surveys Department but our application was rejected.

Q: Page 424 CBOD shown. Can you recognise this letter?

I A: The letter from Land Office rejecting our application to remove the 30% native shareholding condition.

[65] As rightly pointed out by learned counsel for the plaintiff, the defendants did not call any witness from the Lands and Surveys Department to testify on the contents of the letter. They would have been the proper witness to give evidence as to the "Government policies" referred to in that letter.

[66] Further, as shown above, even DW1 did not elaborate on the contents of the letter save for to state that their application to remove the special terms and conditions was rejected by the Lands and Surveys Department. As such, the submissions by the defendants on this issue were without any evidential support.

[67] On the other hand, there have been clear pronouncements by the courts that the decision of the Director under s. 9(1) of the Ordinance is purely discretionary – see *Sa-Mal (Sabah) Corporation Sdn Bhd v. Director Of Lands And Surveys, Sabah* [1994] 3 CLJ 229, *Lim Fong Tsin & Ors v. The Assistant Collector Of Land & Ors* [1997] 1 LNS 7; [1997] MLJU 484, *Workon Sdn Bhd v. The Director Of Lands & Surveys, Sabah & Ors* [1999] 1 LNS 40; [1999] 4 MLJ 177, *Wan Mohamad Hj Undas & Anor v. The Director Of Lands And Surveys & Ors* [2013] 5 BLR 87 and *Abdul Rahman Mohd Noor v. The Director Of Lands And Surveys & Ors* [2013] 5 BLR 95.

[68] The discretionary nature of the Director's power under s. 9(1) of the Ordinance is to be distinguished from the prohibition under s. 17 of the Ordinance which reads:

> Except with the written permission of the Minister all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden and **no such dealings shall be valid or shall be recognised in any court of law** unless they shall have been entered into and concluded before the 16th day of January, 1883, or in the terms of the next following clause. (emphasis added)

[69] On that score, the reliance by the defendants on the Federal Court's decision in *Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors* [2017] 9 CLJ 401; [2017] 5 MLJ 180 and this court's decision in *Wong Kien Ching & Ors v. Ria Realiti Sdn Bhd & Ors And Another Case* [2020] 1 LNS 2243, was, with respect, misconceived. The defendants had not cited any cases which support the contention that a contravention of s. 9(1) of the Ordinance would amount to an illegality.

[70] In any event, I was of the view that if at all, such non-compliance would only affect the company's right to the land which ownership may be liable to be cancelled for non-compliance of the special terms if the Director deemed it to be so. In other words, it did not affect the shareholding in the company itself which formed the subject matter of this action.

[71] In fact, the same approach was taken by the court in *Edgar Stephen Pereira*, the case cited by the defendants. In that case, the plaintiff sought to enforce a trust deed of which he was the beneficiary against the defendant who was the trustee. The defendant alleged that the trust deed was illegal as it contravened the condition of the licence given by Kementerian Dalam Negeri to operate a security company. The High Court did not find it to be so, holding that the transfer of the shares to the plaintiff did not offend against any public policy morality or any statute. What the High Court further held was instructive. The court stated:

> The fact that the Kementerian Dalam Negeri had issued licence to operate the security firm to GNT has nothing to do with the ownership of the shares by its shareholders. **It would be up to the Kementerian Dalam Negeri to decide whether or not it was prepared to continue to grant GNT the licence after the shares were transferred to the plaintiff.** (emphasis added)

[72] Still further, the courts have moved past the previous trend of striking down illegal transactions without further scrutiny – see *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2019] 1 CLJ 183; [2019] 4 MLJ 141 where the Federal Court approved the approach taken by the English case of *Patel v. Mirza* [2017] 1 All ER 191, stating as follows:

> [123] In *Patel*, the English Supreme Court had the opportunity to evaluate the state of the common law in respect of illegality in contracts, as found on the maxim of Lord Mansfield in *Holman v. Johnson* [1775-1802] All ER Rep 98; (1775) 1 Cowp 341 that 'no court will lend it's aid to a man who founds his cause of action upon an immoral or illegal act' and the 'reliance principle' as stated in *Bowmakers Ltd v. Barnet Instruments Ltd* [1944] 2 All ER 579 and *Tinsley v. Milligan* [1993] 3 All ER 65. In that case, the principal issue was whether a party to a contract to carry out an illegal activity was precluded from recovering money paid under the contract from the other party under the law of unjust enrichment. At p. 220 of the report, Lord Toulson had this to say:
>
> > [101] That is a valuable insight, with which I agree. I agree also with Professor Burrows' observation that this expression leaves open what is meant by inconsistency (or disharmony) in a particular case, but I do not see this as a weakness. It is not a matter which can be determined mechanistically. So how is the court to determine the matter if not by some mechanistic process? *In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by*

> *denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality.* We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law.
>
> ...
>
> [126] In addition, we find that the test laid down by Lord Toulson in *Patel* that is to say, the trio considerations, is a sensible one, which we should follow. Applying the test to the facts of this case, we find that it is an overkill for the first defendant to lose the subject land for the infringement of the two Acts which is punishable by a fine upon conviction. (emphasis added)

[73] As noted earlier, no evidence was led by the defendants in respect of the first and second considerations in the test laid down by *Patel v. Mirza.* As for the third consideration, as also noted earlier, even if there were merits in the defendants' allegation, the effect of the non-compliance only extended to the ownership of the company to the land. To my mind, to deprive the estate and the beneficiary(s) of the deceased of the said shares under the circumstances would be an overkill.

[74] Before leaving this issue, I will have to note the reminder by learned counsel for the defendants of the consistent attitude of the courts in "such matter of deceiving the authorities" and that to allow the claim would create a "dangerous precedent". It was further submitted that this would encourage such dubious use of trust deeds as they have nothing to lose because at the end of the day even if the court held the trust deeds were illegal, they could still get the property or subject revert to them.

[75] I found this submission rather odd when it was in evidence that the second defendant was, together with the deceased, a shareholder and director of the company at all material times when the trust deed was entered. If there was such fraud or tort of deceit on the director by this trust deed, surely the second defendant as the remaining director of the company involved in the creation of the trust deed was answerable? Could he really be free of such complicity?

[76] If the above was not enough, there was another reason why the defendants' argument that the trust deed was illegal could not be sustained. And it was this – while strenuously arguing that the trust deed was illegal, the defendants in the same breath urged the court to give effect to the purported sale of the said shares held by the third defendant pursuant to the trust deed to the second defendant and subsequently registered in the name of the first defendant.

[77] More will be discussed on this later but I agreed with the submissions by learned counsel for the plaintiff that by doing so, the defendants were in fact approbating and reprobating which according to decided cases ought not to be countenanced – see *Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor* [2017] 6 CLJ 368 and *Kelana Megah Development Sdn Bhd v. Kerajaan Negeri Johor & Another Appeal* [2016] 8 CLJ 804.

Whether The Said Shares Had Been Wrongfully Transferred To The First Defendant?

[78] The defendants contended that notwithstanding their contentions that the trust deed was tainted with illegality, the sale of the said shares by the third defendant to the second defendant and later transferred to the first defendant were all in order as being the registered owner, the third defendant had the right to sell the said shares, relying on the maxim "let the loss lies where it falls". The case of *Wong Kien Ching v. Seng Kim Huat & Anor* [2019] 7 CLJ 356 and *Palaniappa Chettiar v. Arunasalam Chettiar* were cited as authorities in support.

[79] The defendants further contended that as the third defendant was the registered owner of the said shares, she did not need to rely on the trust deed to claim that right. This submission was obviously to detach the transaction between the third defendant and the second defendant on the said shares from the "illegality" issue raised by the defendants themselves.

[80] Next, the defendants said that the deceased had intended for the said shares for the third defendant to keep. In support, the defendants relied on the evidence of DW3, the wife of the deceased and mother to the plaintiff and the second defendant who testified that the deceased intended to give the said shares to the third defendant so that she could have a continuous income for the rest of her life given that she had helped the company to make a lot of money by securing the land (see Q/A 62 and 63, DW3-WS). The second defendant testified to the same effect (see Q/A 40, DW1-WS).

[81] Lastly, it was submitted that "the native shares" could not be transferred to a non-native.

[82] Firstly, I must say that I found the submissions *ie*, that the sale of the said shares by the third defendant and subsequent transfer to the first defendant, somewhat irreconcilable with the defendants' strenuous submissions that the trust deed (under which the third defendant acquired the said shares) was illegal. It was contrary to the maxim "*nemo dat quod non habet*" or "one cannot give what one does not have" (see *Sia Hiong Tee & Ors v. Chong Su Kong & Ors* [2015] 8 CLJ 1173; [2015] 4 MLJ 188). If indeed the trust deed was illegal and void *ab initio* as contended by the defendants, then there was nothing for the third defendant to have passed on to the second and or the first defendant.

[83] As for the contention that the third defendant being the registered owner has the right to sell the said shares on the strength of the maxim "let the loss lies where it falls", firstly, the reliance on this maxim as held by the Court of Appeal in *Wong Kien Ching v. Seng Kim Huat*, was, with respect, misplaced. The decision, in that case, was in context of the applications under s. 368A(1) and (4) of the Companies Act 1965. In addition, a careful reading of the judgment showed that the Court of Appeal did not hold that the first plaintiff therein was entitled to retain the native title lands on the basis that "the estate should lie where it falls". The Court of Appeal made it clear in its judgment that the ownership of the subject native title lands therein may be fully addressed and determined in a separate substantive action and not before the court dealing with the applications under s. 368A(1) and (4) of the Companies Act 1965.

[84] As for the submissions that "the native shares" were not transferrable to non-native, as correctly pointed out by learned counsel for the plaintiff, the term "native shares" does not form part of the companies' legislation of Malaysia. For all intents and purposes, the said shares were like any other shares in the company which may be transferred including to a non-native. As noted earlier, if at all, the only effect would be on the company's ownership of the land. That decision lies with the director.

[85] Now, to the crux of the matter – the defendants' contention that the deceased had allegedly intended for the third defendant to keep the said shares.

[86] Firstly, the second defendant's pleaded case in his affidavit in opposition was that he did not know that the deceased had the intention for the said shares to remain with the third defendant (see para. 10, encl. 13). However, in what seemed to be another shifting of goalposts by the defendants, the second defendant in his witness statement testified that when he suggested to the deceased for the said shares to be transferred to the first defendant, the deceased had allegedly told the second defendant that he wanted to give the said shares to the third defendant as she had helped the company to earn money and so that the third defendant would have an income for life – see Q/A 39, 40, DW1-WS.

[87] Likewise, DW3 was inconsistent in her evidence. In her affidavit, she stated that the deceased had intended to have the said shares to be held by the third defendant for her lifetime (see para. 31, encl. 14). However, in her witness statement, DW3 testified that the deceased had wanted to give the said shares to her (see Q/A 63, DW3-WS). The choice of words could hardly be said to have been unconsciously made.

[88] It was patently obvious to this court that the allegation that the deceased had given the said shares to the third defendant was a recent creation by the defendants to bolster their case, namely that the said shares were lawfully transferred by the third defendant to the first defendant.

[89] It was very telling that the third defendant was oblivious to the windfall that had allegedly been bestowed upon her by the deceased. The third defendant informed the court that in fact neither the deceased nor the second defendant ever informed her of such "gift". When it was the defendants' turn to give evidence, there was not even an attempt by the second defendant to explain why the third defendant would have made such statement and or to contradict her evidence. The third defendant was also not cross-examined by the defendants of her ignorance of this "gift" despite the opportunity by the court after its questions.

[90] In addition, one needed only to consider the terms of the SPA to know that it was a sham transaction designed so that the said shares be transferred to the first defendant.

[91] Firstly, the timing of the agreement *ie*, on 5 October 2018, a month after the passing of the deceased could hardly be said to be of no significance.

[92] Secondly, the consideration for the sale of the said shares was said to be RM640,000, however, save for some payments before the present dispute arose, it was not in dispute that the third defendant never received the said sum as the amount was to be paid in instalments of RM1,500 per month for 360 months! This would have effectively meant that the third defendant who was 52 years old at the time of the SPA would only see the last of the payment when she is 82 years old.

[93] Thirdly, the sum of RM640,000 was to be inclusive of the sum of RM100,000 used to pay for the purchase of a house for the third defendant. To my mind, had the transaction been genuine as the defendants made it out to be, there would not have been any reason for such terms and conditions. The third defendant was at liberty to find and buy her own house or a mansion for that matter with the RM640,000, not a house of the second defendant's choosing which in this case happened to be his in-laws' property. There was nothing to justify the second defendant in dictating what the third defendant did with the said sum, if in fact the whole transaction was genuine and the said shares were the third defendant's to deal as she pleased.

[94] I also did not find the contention that the third defendant had accepted the terms and conditions when they were explained to her by the legal firm clerk persuasive as the third defendant had testified that she merely followed her "boss", the second defendant's instruction – see Q/A 22, PW2-WS. From my observation of the third defendant's demeanour in court, it was not difficult to understand that she, who was merely a general worker in the plantation owned by the company would have not dared to question any of the decisions by the second defendant.

[95] Lastly, as rightly pointed out by learned counsel for the plaintiff, the purchaser of the said shares under the SPA was not the second defendant but the first defendant whose race in her birth certificate was stated as "Kadazan-Sino" and confirmed as "Anak Negeri/Bumiputera Sabah" by the native court (see pp. 427 to 428, bundle C). The said shares were later transferred to the first defendant from the third defendant.

[96] Had it not been the act of the second defendant which resulted in the transfer of the said shares to the first defendant, the said shares would have, in law, transmitted upon the executors on behalf of the estate of the deceased with effect from 10 September 2018 pursuant to cl. 24 of the memorandum and articles of association of the company which reads:

> In case of the death of a member the survivor or survivors where the deceased was a joint holder, and the legal personal representatives of the deceased where he was sole holder, shall be the only persons recognised by the company as having any title to his interest in the shares; but nothing herein contained shall release the estate of a deceased joint holder from any liability in respect of any share which had been jointly held by him with other persons.

(Also see *Seah Teong Kang and another v. Seah Yong Chwan* [2015] 5 SLR 792 and *United Renewable Energy Co Ltd v. TS Solartech Sdn Bhd* [2019] 8 CLJ 721.)

[97] While on this issue, I had no hesitation to hold that the said shares formed part of the estate of the deceased and in particular, under cl. 20 of the last will which reads:

> I give my holding of shares in Perfect Oil Resources (Sabah) Sdn Bhd (Company No. 629038-U) to my daughter Lee Yee Wuen Malaysia NRIC No. 750220-01-5494 and my son Lee Kai Wuen Malaysia NRIC No. 811224-01-5367 in equal shares but if one of them does not survive me, then the other named beneficiary in this clause shall be the sole beneficiary of this gift.

[98] The defendants contended that had the deceased wanted to bequeath the said shares to the plaintiff and the second defendant, it would have been expressly stated so. It was submitted that the deceased made a conscious decision when he excluded the said shares from his last will. The court's attention was drawn to the word "holding" in cl. 20 of the last will, which according to the defendants to be contrasted from the word "all" which word it was submitted would and ought to be construed as to include shares which were held in trust by third parties.

[99] Firstly, I found no significance in the use of the word "holding" in cl. 20 of the last will. Notably, the other clauses therein also used the word "holding" when referring to shares held by the deceased in the other

companies – see cls. 15, 16, 17, 18 and 19. There was no suggestion that the deceased had also entered into trust deed/s with the third party/s in respect of these shares, thus, the same argument could be made *ie*, that the deceased ought to have used the word "all" instead.

[100] Secondly, if in fact the deceased had intended for the said shares to be given to the third defendant, it would have made more sense for the deceased to include or specify as such in the last will. After all, it was the second defendant's evidence that the deceased made up his mind to "give" the said shares to the third defendant long before he made the last will – see Q/A 38 to 41, DW1-WS.

[101] Thirdly, it was not disputed that the last will was read to the beneficiaries on 21 September 2018. Thus, if in fact, the second defendant and DW3 were already aware of the deceased's alleged intention to have the third defendant keep the said shares for herself, surely, they ought to have voiced this out even then? However, as noted earlier, the allegation that the deceased had allegedly given the said shares to the third defendant only cropped up during the trial – see pp. 50 to 52, NOP.

[102] Taking the totality of the evidence concerning the purported sale of the said shares to the second defendant and subsequent transfer to the first defendant, it was my finding that the third defendant was at all material time holding the said shares in trust for the deceased. That the said shares were trust properties could not be disputed. Thus, the sale and transfer thereof to the second defendant and first defendant respectively was wrongful and the said shares were liable to be returned to the estate of the deceased.

[103] It was also my finding that the second defendant had engineered the purported sale of the said shares to himself in order to deprive the plaintiff from her beneficial ownership of the same pursuant to the last will. It was more probable than not that this plan was hatched after the last will was read on 21 September 2018. That was why the SPA was executed a mere two weeks thereafter on 5 October 2018.

[104] Lastly, the defendants had contended that the plaintiff was not entitled to the orders sought for against the third defendant, *inter alia*, on the ground that the former's cause of action against the latter was only for breach of trust and damages.

[105] I found no merits in the defendants' contention. As can be seen from the following, the court was not hindered from granting the reliefs prayed for by the plaintiff independent of any claim for breach of trust:

> (9) A declaration that the 3rd Defendant is at all material times holding the said Shares in the Company under certificate no. 4, 7 and 10 in trust for the Deceased;

(10) A declaration that the purported Directors' Resolution in writing dated 5.10.2018 signed by the 1st Defendant and the 2nd Defendant approving the transfer of the said Shares to the 1st Defendant is ineffective, null and void and invalid;

(11) An order directing the Company and/or the Company Secretary to cancel and/or reverse the Resolution dated 5.10.2018 and that the register of members of the Company be rectified pursuant to Section 103 of the Act by striking out the name of the 1st Defendant as holder of the said Shares and by inserting *in lieu* thereof the name of the 3rd Defendant the registered holder of the said Shares and notice of such rectification be given to Registrar of Companies;

(12) An order that all members' resolutions of the Company where the 1st Defendant purportedly exercised the voting rights attached to the 900,000 ordinary shares of RM1.00 each in the Company be cancelled and/or reversed and that the books and records of the Company and all and any documents and records recording the same in whatsoever manner be rectified accordingly;

(13) A declaration that the Plaintiff is beneficially entitled to 450,000 units of the said Shares pursuant to the Last Will of the Deceased dated 02.01.2018;

(14) As order directing the 3rd Defendant to transfer or cause to be transferred unto the name of the Plaintiff 450,000 units of the said Shares in accordance with the Last Will and in default thereof the Deputy Registrar of the High Court shall execute the instrument of transfer on behalf of the 3rd Defendant;

Whether The Appointment Of The First Defendant As Director Was Valid?

[106] It was not in dispute that the first defendant was appointed as director of the company pursuant to two written resolutions both dated 1 October 2018, one a members' written resolution and the other a directors' written resolution (see exhs. "D5" and "P4"). On 1 October 2018, when the members' written resolution was passed, the members of the company comprised of the deceased, the second and third defendants, each holding 55%, 15% and 30% shares in the company respectively. Only the second and third defendants signed the members' resolution contrary to the representation that it was by all the members of the company. They also only held the total combined shareholding of 45% which was insufficient to give them a majority within the meaning of s. 291(1) of the Act and contrary to s. 306(4) which requires a written resolution to be passed by the majority members signifying their agreement to the written resolution.

[107] In their rebuttal submission, the defendants had cited art. 68 of the company's articles of association to contend that the sole director could appoint another director. Now, it must again be noted that despite this issue being raised as one of the plaintiff's complaints in this action from the

beginning, it was only in the defendants' submissions in reply that art. 68 was raised as a defence. Respectfully, as shown earlier in this judgment, this was becoming to be a pattern in the defence of the defendants.

[108] Notwithstanding that there was such article in the company's articles of association, I was of the view that when taken together with the rest of the evidence, it was clear that the appointment of the first defendant as a director was engineered by the second defendant almost immediately after the passing of the deceased. I found merits in the plaintiff's submissions that with the first defendant's appointment as a director of the company, the second defendant proceeded to, *inter alia*, change the mandates of the bank accounts of the company which in turn effectively gave him control over the company's finances to the exclusion of the plaintiff.

[109] While PW3 did testify that the executors did not want to interfere with the management of the company, I was of the view that it did not absolve the defendants from complying with ss. 298(1) and 301(1) of the Act which require the service of the proposed members' written resolution on the executors who stood in the shoes of the deceased pursuant to cl. 24 of the memorandum and articles of association of the company. For that reason, I found that the appointment of the first defendant as director was invalid.

Whether The Appointment Of The Second Defendant As Managing Director Was Valid?

[110] Following from the court's finding on the status of the first defendant as director, there was further merit in the submissions by learned counsel for the plaintiff that the board of directors was improperly constituted when it purported to appoint the second defendant as the Managing Director. Further, the reliance by the defendants on the case of *Ulimas Sdn Bhd v. Hi-Summit Construction Sdn Bhd & Other Appeals* [2017] 2 CLJ 636 and *Mohamed Zahid Yon Mohamed Fuad v. Jason Jonathan Lo & Ors* [2019] 1 LNS 343 was misconceived. In *Ulimas*, the court was concerned with a warrant to act and not with the appointment of a Managing Director. The case of *Mohamed Zahid* was distinguishable as the court's decision was based on the right of the second defendant who was the majority shareholder holding 60% in the company to sign a written resolution to appoint the first defendant as director in the company. The court read s. 291(1) of the Act to mean more than half of the number of shareholding of the members and not more than half in number of the shareholders.

[111] There was another pertinent reason why this court was not persuaded by the submission that the court ought not to interfere with the internal management of the company. Respectfully, to accept the argument that the appointments of the first defendant and the second defendant were purely internal management matters, would be to ignore the findings of the court

earlier that second defendant had engineered the sale and transfer of the said shares to deprive the plaintiff of her beneficial right to half of the said shares under the last will. It would also be to disregard the evidence that the second defendant caused resolutions to be passed so as to exclude the plaintiff from being a compulsory signatory of the company's accounts. The effect of which was to prevent the plaintiff from knowing about the financial transactions by the company and deny the plaintiff any say in the management role of the company when previously, the plaintiff did play a role in the company as the Assistant Managing Director whose approvals were required and sought on the company matters – see Q/A 1067 to 1076, NOP. All these were only made possible by the second defendant's position as the Managing Director of the company which was secured through the impugned resolutions signed by the first defendant. In turn, these resolutions would not have come about had it not for the wrongful transfer of the said shares to the first defendant.

Conclusion And Orders

[112] Consequently, this court found that the plaintiff had proven her claim on a balance of probabilities. The defendants had not by their evidence rebut the plaintiff's claim. In the premises, save for prayers (3) and (14) (which were granted as amended below), I allowed the plaintiff's claims as prayed for with costs subject to allocator.

> (3) An order that all directors' resolutions of Perfect Oil Resources (Sabah) Sdn Bhd where the 1st Defendant purportedly exercised her purported right as a director in the said company namely the resolutions as listed under paragraph 72 of Encl. 153 be cancelled and or reversed and that the books and records of the company and all and any documents and records recording the same in whatsoever manner be rectified accordingly.
>
> (14) An order directing the 3rd Defendant to transfer or cause to be transferred unto the Executors on behalf of the estate of the Deceased the said Shares for the due distribution by the Executors in accordance with the Last Will and in default thereof the Deputy Registrar of the High Court shall execute the instrument of transfer on behalf of the 3rd Defendant.

[113] Having not defended the plaintiff's claim, judgment in terms as per the judgment against the first and second defendants was entered against the third defendant with no order as to costs.